# United States Department of Labor
# Employees' Compensation Appeals Board

| | | |
|---|---|---|
| **R.H., Appellant** | ) | |
| **and** | ) | **Docket No. 09-13** |
| | ) | **Issued: March 6, 2009** |
| **U.S. POSTAL SERVICE, POST OFFICE, Scotch Plain, NJ, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On September 30, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 9, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant was in the performance of duty on February 6, 2006 when she slipped and fell.

### ***FACTUAL HISTORY***

On February 6, 2006 appellant filed a traumatic injury claim (Form CA-1) alleging that on that date she slipped and fell while attempting to retrieve her purse from the women's locker room. In a narrative statement, appellant indicated that she went to get her purse and coat, in preparation for lunch, and the custodian had been waxing the floor and told her the floor was wet. She stated there were no caution signs posted. Appellant asked the custodian to get her

coat and he stated he would follow her into the locker room. She opened the door, slipped and fell, sustaining a broken ankle.

In a February 6, 2006 statement, a supervisor, Yang Kao, stated the area of the incident was marked with "Caution Wet Floor" signs. A custodian, Cliff O'Brien, provided a statement that he was waxing the locker room and the hallway floors, and signs were posted while the floor was drying. He stated both he and another custodian, Bob Leahey, told appellant the floor was wet but appellant insisted on getting her coat. Mr. Leahey offered a statement that appellant was told several times not to walk on the floor, but Mr. O'Brien stated that he would follow appellant with the waxing mop. The postmaster provided a February 22, 2006 statement that the employing establishment was controverting the claim as appellant willfully disregarded the instructions of the maintenance personnel.

By decision dated March 22, 2006, the Office denied the claim for compensation. The Office found the medical evidence was insufficient to meet appellant's burden of proof.

Appellant requested a review of the written record. By decision dated July 11, 2006, the Office hearing representative remanded the case, finding that the issues of willful misconduct and performance of duty had not been properly addressed.

In a letter dated July 25, 2006, the postmaster indicated that a seven-day suspension had been proposed for appellant's actions on February 6, 2006 and the disciplinary action was being discussed with the union representative.[1] The postmaster stated it was customary to wax the floors in the middle of the day.

By decision dated October 25, 2006, the Office denied the claim on the grounds that appellant had engaged in willful misconduct. In a decision dated August 8, 2007, it vacated the July 11 and October 25, 2006 decisions. The Office found the determination of willful misconduct was inappropriate as the affirmative defense had not been adjudicated in the initial Office decision.

In a separate decision dated August 8, 2007, the Office denied the claim on the grounds that appellant was not in the performance of duty. It found that by ignoring the custodian's verbal instructions appellant had taken herself out of the performance of duty.

Appellant requested a hearing before an Office hearing representative, which was held on December 18, 2007. She stated that a custodian told her "Don't walk on that. That's wet." According to appellant, she asked both custodians if they would go in to get her things, and one of them told her that one side looked a little dry and he would follow her just in case. The custodian, Mr. O'Brien, submitted a September 14, 2007 statement that he escorted appellant to the locker room.

By decision dated March 20, 2008, the Office hearing representative affirmed the August 8, 2007 decision denying the claim for an injury sustained in the performance of duty.

[1] Appellant reported in a July 26, 2007 statement that the suspension "was not given after my union filed an appeal."

The hearing representative cited the case of *Conrad R. Debski*, 44 ECAB 381 (1993), and found appellant was engaged in a prohibited activity that took her out of the performance of duty. In a decision dated September 9, 2008, the Office denied modification of the prior decision.

## ***LEGAL PRECEDENT***

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of her duty.[2] The phrase "sustained while in the performance of [her] duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[3] "Arising in the course of employment" relates to the elements of time, place and work activity. An injury is said to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while she is fulfilling her duties or engaged in doing something incidental thereto. "Arising out of employment" relates to the causal connection between the employment and the injury claimed.[4]

It is well established that employees who, within the time and space limits of their employment, engage in acts which minister to their personal comfort do not leave the course of employment.[5] Activities encompassing personal acts for the employee's comfort, convenience and relaxation; eating meals and snacks on the premises, including established coffee breaks; and the employee's presence on the premises for a reasonable time before or after specific working hours, are reasonably incidental to employment and are, therefore, in the course of employment.[6] Even if the activity cannot be said in any sense to advance the employer's interest, it may still be in the course of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs or practices of the particular employment, the activity is in fact an inherent part of the conditions of that employment.[7]

## ***ANALYSIS***

On February 6, 2006 appellant walked down a hallway to the women's locker room to retrieve her coat and purse in preparation for lunch. She was on the employing establishment premises during work hours and the Office did not contest that retrieving her personal items was

[2] 5 U.S.C. § 8102(a).

[3] *Bernard D. Blum*, 1 ECAB 1 (1947).

[4] *Eugene G. Chin*, 39 ECAB 598 (1988); *see Charles Crawford*, 40 ECAB 474 (1989) (the phrase "arising out of and in the course of employment" encompasses not only the concept that the injury occurred in the work setting, but also the causal concept that the employment caused the injury); *see also Robert J. Eglinton*, 40 ECAB 195 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

[5] A. Larson, *The Law of Workers' Compensation* § 21 (2007).

[6] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4.a. (August 1992).

[7] *Conrad R. Debski*, 44 ECAB 381 (1993).

reasonably incidental to her employment. The evidence indicates that the hallways and locker room had recently been waxed and remained wet. While a custodian and a supervisor stated that cautionary signs were posted, appellant indicated she did not see any signs.

The Office found that when appellant walked on the wet floor and entered the locker room she was no longer in the course of employment, as she was engaging in a prohibited activity. In support of this finding, the Office cited the *Debski* case.[8] In *Debski*, the claimant was injured while collecting his personal mail from the rear area of the post box section. Evidence was provided that the employing establishment prohibited employees from this area unless they were assigned to that area and prohibited the activity of collecting personal mail. The record indicated that employees had been advised through safety service talks that the box section area was off limits and signs had been posted. The Board found that the express prohibition of the specific incidental activity placed the injury outside the course of employment.[9]

The evidence in this case is distinguishable from the *Debski* case. Appellant was advised by two custodians that the floor was wet and she should not go into the locker room. She asked if the custodians could retrieve her coat and purse, but appellant eventually walked to the room with a custodian following behind her. The employing establishment did not expressly prohibit appellant from entering the locker room. No evidence was presented that the custodians had authority to prohibit any activity by an employee. They cautioned appellant regarding the floor and one custodian attempted to accompany appellant. If signs were present, they were cautioning employees to use care, not advising employees that the area was closed until further notice. While the employing establishment may have wished appellant exercised more care, this does not preclude her claim for compensation. As the Board explained in *M.H.*,[10] even if an employee does not adequately follow safety procedures, there is no provision in the Act allowing the denial of a claim for compensation because the employee did something imputing culpability or fault on her part. The employing establishment did not expressly prohibit employees from entering areas that had recently been waxed, or specifically prohibit employees from the area where appellant slipped and fell.

The Board finds the evidence in this case is not sufficient to take appellant out of coverage under the Act. On February 6, 2006 she was on the employing establishment premises and engaged in an activity reasonably incidental to her employment. The case will be remanded to the Office for adjudication of the claim as to whether the medical evidence is sufficient to establish an injury arising out of the employment.

[8] *Id.*

[9] *See* Larson, *supra* note 5 at § 33: "Violations of express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities contributing directly to the accomplishment of the main job, are an interruption of the course of employment."

[10] 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008).

## ***CONCLUSION***

The Board finds that appellant was in the course of employment when she went to retrieve her personal items and slipped on a recently waxed floor.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 9 and March 20, 2008 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 6, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board